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Utah Supreme Court

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**IN THE SUPREME COURT
of the
STATE OF UTAH**

STERLING JACOBSON and GEN-
TRAL UTAH BLOCK COMPANY,
a Corporation,

FILED

MAR 28 1960

Plaintiffs and Respondents, Clerk, Supreme Court, Utah

—vs.—

RALPH MEMMOTT, MERRILL G.
MEMMOTT, GRACE K. MEMMOTT
and MARIE S. MEMMOTT,

Defendants and Appellants.

BRIEF OF RESPONDENTS

Intermediate Appeal from the District Court of the
Fifth Judicial District in and for Millard County.

Honorable Maurice Harding, Judge

GUSTIN, RICHARDS &
MATTSSON,

*Attorneys for Plaintiffs and
Respondents*

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IN THE SUPREME COURT of the STATE OF UTAH

STERLING JACOBSON and CEN-
TRAL UTAH BLOCK COMPANY,
a Corporation,

Plaintiffs and Respondents,

—vs.—

RALPH MEMMOTT, MERRILL G.
MEMMOTT, GRACE K. MEMMOTT
and MARIE S. MEMMOTT,

Defendants and Appellants.

Case No.
9120

BRIEF OF RESPONDENTS

This is a condemnation proceeding to secure to plaintiffs a surface right-of-way across defendants' mining property in order to facilitate the mining of plaintiffs' property, which property is adjacent to that of the defendants. Believing, as we do, that defendants (appellants herein) have misconceived the issues, and in order that the same be more precisely stated, it is appropriate to restate the facts.

STATEMENT OF FACTS

Defendants have been permitted to take an intermediate appeal from an order of the District Court of Millard County, Utah, entered on July 10, 1959 (R. 28-32), denying defendants' motion to dismiss plaintiffs' complaint as the same was further amended at the hearing reflected by the order. The amended complaint (R. 12-13) denominates the plaintiff's mining claim as the "Red Robin" and the defendants' adjoining mining claim as the "Red Hill." The amendments permitted by the trial court are set forth in the order of July 10, 1959, and are incorporated in the amended complaint by reference. In other words, the amended complaint and the order permitting the further amendments must be read together to determine the propriety of the motion to dismiss. Furthermore, the order appealed from permitted plaintiffs to further amend by adding as Exhibit 4 the map showing the course of the center line of the present existing roadway across defendants' claim.

The order of July 10, 1959, grants to plaintiffs a surface right-of-way to be used jointly with the defendants across the existing roadway upon the condition "that when it becomes necessary for the defendants to mine the cinders lying under said right-of-way, and upon reasonable notice from the defendants, plaintiffs will move said right-of-way to some other feasible place over defendants' claim" (R. 31-32). The amendments

to the amended complaint as reflected in the July 10th order are:

(Paragraph 5)

“Plaintiffs are entitled to have a right-of-way for the purposes hereinbefore set forth over the premises known as the Red Hill Mining Claim for the purposes of transporting their ore and supplies to and from the mining operations over the present existing road, which is approximately one rod wide, or if defendants so desire, over the present and proposed road that should be approximately the same width, and which road or roads may be used jointly by the occupants or individuals joining Red Hill Mining Claim, and that plaintiffs will move from the present existing road to any other feasible road across defendants’ mining claim upon receiving reasonable notice to do so and having an opportunity to construct such road when it becomes necessary for defendants to mine the cinders lying under said road or roads.” (R. 28-29)

(Paragraph 3 of the prayer)

“That upon the payment of the value of the same plaintiffs be granted a perpetual right of way and easement over and across said lands as set forth in the complaint, provided, however, that if it becomes necessary in the mining operations of defendants’ claims to remove the material under said right-of-way that upon reasonable notice, plaintiffs will move the right-of-way to any other feasible place over defendants’ claim.” (R. 29)

Defendants contend (a) that their property is already appropriated to the same public use proposed

by plaintiffs, and (b) the complaint does not specify the land to be condemned but sets forth a claim to a "floating" or "variable" right-of-way, and therefore the action should be dismissed.

STATEMENT OF POINTS

POINT I.

THE CLAIM THAT DEFENDANTS' PROPERTY IS ALREADY APPROPRIATED TO A PUBLIC USE REQUIRING PROOF BY PLAINTIFFS OF A MORE NECESSARY PUBLIC USE MISCONCEIVES THE ISSUE INVOLVED.

POINT II.

PLAINTIFFS' COMPLAINT AS AMENDED BY THE ORDER OF JULY 10, 1959, STATES A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

ARGUMENT

POINT I.

THE CLAIM THAT DEFENDANTS' PROPERTY IS ALREADY APPROPRIATED TO A PUBLIC USE REQUIRING PROOF BY PLAINTIFFS OF A MORE NECESSARY PUBLIC USE MISCONCEIVES THE ISSUE INVOLVED.

Unless it be the existing roadway, there is no suggestion in this case that any of defendants' property is devoted to public use within the connotation of Subsection (3) of Section 78-34-3, *Utah Code Annotated* 1953, which reads:

"The private property which may be taken under this chapter includes:

* * *

(3) Property appropriated to public use; provided, that such property shall not be taken unless for a more necessary public use than that to which it has been already appropriated."

The right-of-way granted by the order appealed from is centered along a present existing roadway on defendants' property, the right to be used in common with the defendants. Assuming for the purpose of argument that the present roadway has become dedicated or appropriated to public use, the plaintiffs are not proposing a taking which is inconsistent or in interference with or an impairment of the first taking, and there defendants' argument is not applicable. In 2 *Lewis Eminent Domain*, Section 441, Third Edition, it is said:

"The general rule is founded upon the presumption that the legislature did not intend, by a general grant of the eminent domain power, to authorize an interference with the enjoyment of property devoted to public use under prior grants of the same power. A taking which is no interference present or prospective with the prior use, is not within the rule. Consequently it is generally held that an easement or joint use may be appropriated, where the two uses are not inconsistent and the second is no interference with or impairment of the first. Taking an easement for a telegraph or telephone line upon a railroad right of way is a familiar example."

In *Salt Lake City v. Salt Lake City Water & Elec. Power Co.*, 24 Utah 249, 67 P. 672, it is said:

"Under the statutes of eminent domain the law seems to be well settled that, where two

public uses can stand together without material impairment or impediment of one by the other, they must so stand. This court so held in *Postal Tel. Cable Co. v. Oregon S. L. R. Co.*, 23 Utah 474, 65 Pac. 735. In deciding a like question in the case of *Boston Water Power Co. v. Boston & W. R. Corp.*, 23 Pick. 360, Mr. Chief Justice Shaw said: 'Both uses may well stand together, with some interference of the later with the earlier, which may be compensated for in damages.' Lewis, Em. Dom. Section 274; *Mining Co. v. Corcoran*, 15 Nev. 147; *Bridge Co. v. Dix*, 6 How. 507, 12 L. Ed. 535; *In re Towanda Bridge Co.*, 91 Pa. 216; *Enfield Toll Bridge Co. v. Hartford & N.H.R. Co.*, 17 Conn. 454, 44 Am. Dec. 556."

The Utah statute was construed in *Freeman Gulch Min. Co. v. Kennecott Copper Corp.* (10 Cir., 1941), 119 F.2d 16:

"A statute granting the right of eminent domain for a particular purpose must be liberally construed in furtherance of such purpose. *Monetaire Mining Co. v. Columbus Rexall Consol. Mining Co.*, 53 Utah 413, 174 P. 172, 175.

While we think the facts demonstrate beyond question that the use for which Kennecott seeks condemnation is a more necessary public use than the use to which the property is being devoted by Freeman, the question of greater necessity is not involved where the condemner seeks the right to use the property in common with the present owner thereof. *Monetaire Mining Co. v. Columbus Rexall Consol. Mining Company*, supra, 174 P. 176.

We shall assume, but not decide, that the property here sought to be condemned is now

devoted to a public use. It is well settled that property devoted to one public use may, under general statutory authority, be taken for another public use, where the taking will not materially impair or interfere with, or is not inconsistent with the use already existing. Such a taking is expressly authorized by Section 104-61-3(5)."

In *Postal Tel. Cable Co. v. Oregon S.L.R. Co.*, 23 Utah 474, 65 P. 735, the contest was between the Postal Company and the Railway Company, the former seeking a right-of-way for a pole line upon the railroad right-of-way. In holding that the reference to the railroad bed is a sufficient description under the statute, and that the business of telegraphy is obviously a public business and that the Postal Company had the right to exercise the power of eminent domain, the Court stated, as between the two possible conflicting uses of the property sought to be condemned, the following:

"It is contended by appellant that the respondent had no power to locate its telegraph line longitudinally upon appellant's right of way, because, when the lands have been once taken, by virtue of the power of eminent domain or otherwise, and appropriated to a public use, as is the right of way in controversy, such land cannot again be subjected to another public use, unless such secondary appropriation be authorized by the legislature. The authorities, however, affirm that this rule only applies when the second public use, by reason of its nature or character, necessarily supersedes or destroys the former use."

In the instant case the existing roadway over the

defendants' mining claim, if appropriated to public use, is to be used in common with defendants for the same purposes, namely: that of transporting ore and supplies, a use which does not supersede or destroy the former use. The early case of *Highland Boy Gold Min. Co. v. Strickley*, 28 Utah 215, 78 P. 296, holds that the construction and operation of roads for the development and working of mines is a public use, the Court stating in part:

“Now, it is of vital importance to the people that the coal, as well as the other hidden resources of the state, be opened up and developed, and that the mining industry in general, which has been the source of so much wealth to the people of this and other Western states, be conducted on the same extensive scale in the future that has characterized its operations in the past. Therefore the public policy of the state, as exemplified by the act of the Legislature under consideration, is to encourage the people to open up and exploit the mines with which the state abounds, and thereby not only give to the state the wealth which will enable other industries to be created, but furnish thousands of laborers with remunerative employment.

It being conceded, and this court having held, that the construction and operation of irrigating ditches in this state is a public use (*Nash v. Clark*, 27 Utah 158, 75 P. 371), it follows that the construction of roads and tramways for the development of the mining industry is a public use, as the same line of reasoning that applies in support of the doctrine in the one case holds good in the other.”

Defendants' resistance to the use by the plaintiffs of the present existing roadway implies a private use and one that they might discontinue at their pleasure. In this regard 2 *Lewis Eminent Domain*, Section 445, Third Edition, states:

“Property of individuals and private corporations devoted to a use of a public nature for which the power of eminent domain might be exercised, but which use is purely voluntary and may be discontinued at the pleasure of the owner, is subject to condemnation under a general power the same as if devoted to private uses.”

POINT II.

PLAINTIFFS' COMPLAINT AS AMENDED BY THE ORDER OF JULY 10, 1959, STATES A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Subsection (5) of Section 78-34-3, *Utah Code Annotated* 1953, containing the language that all rights-of-way for the purposes mentioned in Section 78-34-1, which latter section permits the exercise of the right of eminent domain for roads to facilitate the working of mines or mineral deposits, and Subsection (1) of Section 78-34-2 to the effect that when the surface ground is underlaid with minerals sufficiently valuable to justify extraction a perpetual easement may be taken only over the surface ground over such deposits, and the last portion of Subsection (5) of Section 78-34-3 “but such uses of crossings, intersections and connections shall be made in the manner most compatible with the greatest public benefit and the least private injury,”

invite the amendment to paragraph 5 of the complaint permitted by the July 10th order (R. 28-32).

Defendants say that the amendment contemplates “a floating or variable right-of-way” and therefore the complaint as amended does not state a claim upon which relief can be granted. On the contrary, the amendment is calculated to mitigate the damage and injury to the defendants. It recognizes the joint use of the present existing road and permits a change upon reasonable notice *by the defendants* when it becomes necessary for them to mine the cinders underlying the existing road, the court to then determine another feasible right-of-way across defendants’ property. Said Section 78-34-2(1) permits only a surface right under the circumstances indicated and by necessary implication permits the mining of the underlying minerals by the defendants, leaving to the resourcefulness of a court of equity within its inherent power to devise a rule flexible and elastic enough to fairly and justly meet the circumstances of the case. This is what the trial court did by permitting the amendment.

Defendants cite *Tripp v. Bagley*, 74 Utah 57, 276 P. 912, to the effect that an easement once selected cannot be changed by either the landowner or the easement owner without mutual consent. The *Tripp* case is not in point and deals primarily with the establishment of boundary lines by acquiescence over a long period of time. Furthermore, the amendment to the complaint in the instant case does not suggest any arbitrary

or coercive right on the part of the plaintiffs, but recognizes the comprehensive and equitable power of the court to make such changes in the surface right-of-way as may be feasible upon the defendants desiring to mine the underlying mineral, if any there be.

From their brief defendants seem to be prejudging their position with respect to damages, an issue expressly reserved by the trial court in the July 10th order. They lose sight of the fact that the statute contemplates a joint user of the right-of-way and an equitable method of determining the compensation based upon all of the known facts and circumstances and such as to reflect justice in the instant case. The joint use and inherent power of the court to devise a formula for compensation based upon the realities of each case is clearly recognized by this Court in *Monetaire Mining Co. v. Columbus Rexall Consol. Mines Co.*, 53 Utah 413, 174 P. 172, where the Court stated:

“Counsel, however, state that there is no way to determine what the compensation shall be to the owner. It is, however, well settled that, where property may be condemned for the purpose of a joint use or a use in common, the whole matter of determining what is a reasonable compensation under all the circumstances, as well as the regulations respecting the use of the property, is determined and regulated according to the rules of equity. 2 Lewis, Eminent Domain (3d Ed.) Section 423.

* * *

In view that the business of mining is necessarily highly speculative; that the prices of most

metals are fluctuating so that to mine a certain grade of ore may be profitable this year while the price may be so much lower the next that it would be ruinous to attempt to mine it; that the contemplated ore bodies may be much smaller in extent than was expected; and numerous other things that might be mentioned — *the joint use of a mining tunnel of necessity must be temporary only. It is for that reason that some equitable method of determining and fixing the compensation for the joint use must be devised which must be based upon all the known facts and circumstances, and must be such as to reflect justice in each case.* To fix the compensation in a lump sum might defeat the very end in view. Some just method of compensation is all the law contemplates, and that is all that can be required in each case. It is manifest that in this case no effort whatever was made by appellant and respondent to arrive at an understanding regarding either the character or extent of compensation, nor with regard to the nature and extent of the use of the tunnel by appellant; and it is equally manifest that so long as the respondent can treat the tunnel in question as its own private affair, to which no one may gain access except by its consent, no such an understanding or agreement is possible.”

Consistent with the foregoing is the recent expression by this Court in re *Water Rights of Escalante Valley Drainage Area*, Utah....., 348 P.2d 679 (Feb. 26, 1960 Advance Sheet), states:

“The inherent power always exists in a Court of equity for devising new and more adequate remedies if the facts of the case justify such

action, and does not conflict with the law. The equitable jurisdiction of the court is and should be flexible, elastic enough to meet changing conditions and problems.”

CONCLUSION

The *Monetaire Mining Co.* case, *supra*, which recognizes the joint use of a mining tunnel, the use of which of necessity must be temporary, coupled with the expressions of this Court in recognizing the inherent power of the trial court to make its orders and decrees flexible and elastic enough to meet changing conditions and problems, and the recognition by the legislature that the exercise of the right of eminent domain must be compatible with the greatest public benefit and the least private injury, answers the important question in this case dealing with the propriety of the amendments complained of. The order of July 10, 1959, discloses a conscientious judicial approach to the practical solution of an awkward problem, leaving a just method of compensation for future determination.

The order appealed from should be affirmed.

Respectfully submitted,

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Respondents*